Meeting Minutes

Public Body Procurement Workgroup

Meeting # 4

Wednesday, August 31, 2022, 9:30 a.m.
Conference Rooms C, D, and E
James Monroe Building
101 N 14th St, Richmond, Virginia 23219

http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/

The Public Body Procurement Workgroup (the Workgroup) met in-person in conference rooms C, D, and E in the James Monroe Building in Richmond, Virginia, with Sandra Gill, Deputy Director of the Department of General Services (DGS), presiding. The meeting began with remarks from Ms. Gill, followed by presentations, discussion, and public comment. Materials presented at the meeting are available through the Workgroup's website.

Workgroup members and representatives present at the meeting included Sandra Gill (Department of General Services), Matthew James (Department of Small Business and Supplier Diversity), Joshua Heslinga (Virginia Information Technologies Agency), Lisa Pride (Virginia Department of Transportation), Jason Saunders (Department of Planning and Budget), Patricia Innocenti (Virginia Association of Governmental Procurement), John McHugh (Virginia Association of State Colleges and University Purchasing Professionals), Leslie Haley (Office of the Attorney General), Adam Rosatelli (Senate Finance and Appropriations Committee) and Amigo Wade (Division of Legislative Services). Andrea Peeks, representing the House Appropriations Committee, was absent.

I. Call to Order; Remarks by Chair

Sandra Gill, Deputy Director
Department of General Services

Ms. Gill called the meeting to order and reminded the Workgroup that it will be focusing on SB 550 at this meeting and its task to review whether the issue of nonpayment between general contractors and subcontractors necessitates legislative corrective action. She requested that stakeholders who have already provided public comment to the Workgroup at previous meetings limit their comments to any new information that they wish to share with the Workgroup.

II. Approval of Meeting Minutes from the August 11, 2022 Workgroup Meeting

Mr. Heslinga made a motion to approve the meeting minutes from the August 11, 2022 meeting of the Workgroup. The motion was seconded by Mr. Wade and unanimously approved by the Workgroup.

III. Comments on SB 550 from the Construction Section of the Office of the Attorney General

Curtis Manchester, Senior Assistant Attorney General with the Construction Section at the Office of the Attorney General, provided comments to the Workgroup on SB 550. He emphasized that his comments are not to be construed as an opinion from Attorney General Miyares or the Office of the Attorney General as a whole, but are rather comments from the Construction Section based upon its experience handling day-in and day-out issues involving public procurement and public construction. He shared that the goal of his comments is to provide awareness to the Workgroup of some of the issues the Construction Section sees with SB 550, as well as some of its potential ramifications. He noted that his comments touch upon three areas – (i) the amendments made by SB 550 to the Virginia Public Procurement Act (VPPA), (ii) the amendments made by SB 550 to Title 11, and (iii) comments made by others regarding SB 550.

First, though, Mr. Manchester provided an overview to the Workgroup of how the former provisions of the Prompt Payment Act in the VPPA came to be. He noted that the VPPA was passed after an extensive two-year study undertaken by a task force chaired by DGS. The task force included members from both the private sector and public sector. He explained that the study included an extensive review of all of the procurement laws to understand how the state was procuring goods and construction. He noted that the task force issued a final report in 1980 and shared some of the findings in the final report with the Workgroup. First, he highlighted that the task force made no finding or recommendation that general contractors should pay subcontractors notwithstanding nonpayment from the owner. Any payment arrangements were left to the contracts developed by the contracting parties, other than any new VPPA curtailment. Regarding the potential for nonpayment to subcontractors, he noted that the task force found it sufficient to temper such risk by requiring general contractors to post payment bonds on public projects. He highlighted that the task force also protected general contractors by allowing for permissive retainage of a percentage of the amount due in progress payments in order to ensure faithful performance of the subcontract by the subcontractor. The task force emphasized that the hallmark of public procurement must be competition for public work, meaning access of public owners to competitive bids or competitive negotiation offers. The more competition for the award of contracts, the better the choices for the public owners and the better use of public funds. He stated that the task force concluded its report by noting that it had strived to provide a comprehensive framework for public procurement at every level in Virginia.

Mr. Manchester further explained that after the report was issued and the VPPA was passed in 1980, there was a two-year delayed effective to allow for additional public

comment and consideration. The VPPA eventually became law in 1982. He noted that shortly thereafter, the General Assembly amended the VPPA to add what is known as the Prompt Payment Act provisions. He explained that those provisions require that once a public owner releases funds to a general contractor, the general contractor must issue those funds downstream to its subcontractor or provide a reason for nonpayment within seven days. He emphasized that those Prompt Payment Act provisions remain in effect today, even though SB 550 has added a new layer of requirements over top of them.

Moving on to discuss the amendments to the law made by SB 550, he explained that they essentially serve to make unenforceable traditional payment clauses known as "pay-if-paid" or "pay-when-paid." He explained that "pay-if-paid" clauses establish payment by the owner to the general contractor as a condition precedent to the general contractor's payment being due to the subcontractor. He emphasized that SB 550 makes these clauses unenforceable. He further explained that "pay-when-paid" clauses are distinct and have historically been found to be a reasonable timing mechanism between parties for the payment of sums. He noted that such clauses do not place the financial burden on the general contractor to front payments to the subcontractor before the general contractor itself has received payment from the owner.

Mr. Manchester then discussed some potential negative ramifications from SB 550's requirement that general contractors make payment to a subcontractor notwithstanding whether they themselves have received payment from the owner. First, he noted that such requirement may deter some general contractors from participating in public contracting. He explained that they may feel that they are unable to shoulder the financial burden or they simply may not want to deal with it. Second, he noted that such requirement is likely to lead to a decrease in the number of bidders for certain projects depending upon the value of the project or the capacity of the contractor. Third, he noted that such requirement is likely to lead to an increase in bid amounts due to the fact that general contractors will now be shouldering a new financial burden. Fourth, he noted that such requirement will likely similarly lead to an increase in prices for construction management at-risk fees. Finally, he noted that such requirement could affect general contractors' bonding capacity. He emphasized that all of these effects would, unfortunately, serve to undermine the VPPA's goal of maximizing competition and would increase costs for public construction.

Noting the Construction Section's agreement with many of the comments that they have read or heard regarding issues with the wording of the amendments made by SB 550, Mr. Manchester then walked the Workgroup through some technical amendments that they have identified that could improve the clarity of the changes made by SB 550. First, he noted that lines 11-12 of the bill require a payment clause that obligates a contractor to be liable for the "entire amount owed" to any subcontractor. He stated that "entire amount owed" seems a bit unclear, because amounts are either owed or not owned. He stressed that the amendments made by SB 550 did not delete the permissive retainage provisions for general contractors and subcontractors on public projects, so if the phrase "entire amount owed" was intended to affect those provisions it did not have such affect. He

emphasized that it is unclear what effect the "entire amount owed" language is intended to have.

Second, he pointed the Workgroup to the narrow description on lines 12-13 of the bill of the basis upon which a general contractor may withhold money from a subcontractor. He stated that those lines state that general contractors shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract. He noted that this point is obvious, but there may be additional legal reasons beyond noncompliance with the terms of the subcontract for which the contractor could legitimately withhold payment. For example, the subcontractor could have filed for bankruptcy or have agreed to allow set-off of debts owed by the subcontractor on other projects. He stressed that there are many other legal reasons for which parties may want or need to withhold payment.

Third, Mr. Manchester noted that lines 14-16 of the bill contain a directive to the general contractor that if it intends to withhold payment, it must notify the subcontractor of such intention and provide the reason for nonpayment. He highlighted that the bill, however, does not indicate what event triggers the requirement to provide such notice nor a timeframe within which such notice must be given.

Moving on to SB 550's amendments to Title 11 dealing with private contracts, Mr. Manchester stated that the Construction Section was struck by the fact that the new law restricts the freedom of private parties on private projects that do not involve public funds to agree to the payment terms between them. The amendments establish timeframes within which owners must pay general contractors and general contractors must pay others. He noted that the amendments made by SB 550 were clearly a policy choice made by the General Assembly, but SB 550 does not appear to the Construction Section to be a law dealing with police power, health, safety, crime, taxation, etc. He noted that private parties have historically, under English common law and Virginia law, had freedom to contract and to arrange the commercial terms between them.

Regarding SB 550's amendments to § 11-4.6, Mr. Manchester expressed a desire for more clarity as to the scope of contracts to which they apply. He noted that there are two issues in this regard. First, lines 45-49 of the bill define "construction contract" as meaning "a contract between a general contractor and a subcontractor *relating to* the construction … of a building … [or] of projects other than buildings." He posited the question as to what "relating to" means. He asked what it covers. He stated that he believes that some of the participants in the industry have very rightfully raised the issue of whether this definition applies to their contracts. He noted that it is the Construction Section's understanding that the General Assembly's intent was not to cover contracts for professional services, including architectural, professional engineering, and other professional services. He explained that the Construction Section believes that clarifying the definition of "construction contract" in § 11-4.6 would not be just a technical amendment, but would really be a substantive matter that the Workgroup should consider if the General Assembly is going to revisit this matter. Second, he noted that the Construction Section noticed inconsistencies in SB 550's amendments to § 11-4.6 in that

subsection B refers to "construction contracts," whereas subsection C refers to "any contract." He expressed that he does not believe that the General Assembly intended for the provisions of subsection C to apply to "any contract" because the rest of the amendments made by SB 550 deal exclusively with construction contracts. He suggested that technical amendments be made to improve the clarity of the bill regarding these two issues.

Mr. Manchester noted that § 11-4.6 has the same issue as § 2.2-4354 in the VPPA above regarding the narrow description of the basis upon which a general contractor may withhold money from a subcontractor. He reiterated that there can be many other legal reasons pursuant to which a general contractor is required to or may wish to withhold payment. He suggested that adding "or other legal basis" may assist in clarifying the reasons for which payment may be withheld. Relatedly, he also noted that subsection B and subsection C use inconsistent language to denote the reasons for which a general contractor may withhold payment. He noted that line 73 in subsection C of the bill states that a higher-tier contractor shall not be liable for amounts otherwise reducible "pursuant to a breach of contract by the subcontractor[,]" whereas line 58 in subsection B states that a private owner is not required to pay amounts invoiced that are subject to withholding for the general contractor's "noncompliance with the terms of the contract" and line 13 in § 2.2-4354 states that a contractor on a public contract shall not be liable for amounts otherwise reducible due to the subcontractor's "noncompliance with the terms of the contract." He stated that the Construction Section suggests improving the clarity and uniformity of the provisions of the Code added by SB 550 in order to make them more understandable by all parties.

The final technical amendment that Mr. Manchester discussed pertains to the inconsistent payment deadlines in subsections B and C for owners and general contractors. He noted that subsection B requires owners to pay within 60 days of *receipt of an invoice*, whereas subsection C requires contractors to pay within 60 days of *satisfactory completion of the work* or seven days after receiving the owner's money. He stressed that this inconsistency will likely cause confusion, and that unless "satisfactory completion of the work" is defined in the contract, such clause may be unclear or unwieldy to use.

Finally, Mr. Manchester discussed some of the public comments made by others regarding SB 550. First, he noted that he agrees with stakeholders' comments that the provisions of SB 550 should be amended to clarify whether or not they apply to contracts for professional services. He said that he believes is a legitimate concern. Second, he mentioned stakeholder comments that were made at previous Workgroup meetings suggesting that the Workgroup or the General Assembly should consider changes to Virginia's mechanics lien laws. He explained that mechanics lien laws allow persons who provided materials or labor on a project and who were not paid to place a lien on the real estate on which they worked and ultimately have the property sold to pay them. He noted that often private property owners have no idea who worked on their project, did not know that such individuals were unpaid, and had no privity of contract with them. He explained that these laws provide a right against landowners where there is no such right under common law, and noted that he was explaining these things in order to caution that

any review of this area of the law or any consideration of potential changes to it should be done via a study featuring multiple stakeholders, including commercial property owners, lenders, and others that are beyond the membership of the Workgroup. He stressed that because this area of the law is so technical with regards to timing and rights, and because it can significantly impact private landowners, any potential changes to it would best be reviewed by a group such as the Boyd-Graves Conference.

The Workgroup had no questions for Mr. Manchester.

IV. Presentation on Potential Technical Amendments to SB 550

Next, Jessica Budd, staff to the Workgroup, gave a presentation to the Workgroup regarding potential technical amendments that it could consider recommending to the General Assembly to improve SB 550's clarity, consistency, and implementation. She noted that her presentation would overlap somewhat with some of the technical amendments identified earlier by Mr. Manchester, but she stated that she hoped that hearing them again would make it easier for the Workgroup to understand them.

Ms. Budd highlighted that one of the common themes that the Workgroup has heard in both the written and oral testimony that it has received from stakeholders on SB 550 is that some of its language is unclear, inconsistent, and confusing, leading to problems with its interpretation and implementation. As such, the Workgroup's staff compiled this list of potential technical amendments to SB 550 based on comments and suggestions made by stakeholders and others. She pointed the Workgroup to a handout that she created listing each of the amendments.

Before going through the list of potential technical amendments, however, Ms. Budd provided the Workgroup with a quick overview of SB 550. She explained that its effective date is January 1, 2023 and that it appears intended to apply to both public and private construction contracts and all tiers in the contracting chain. She then noted that SB 550 addresses two primary issues: (i) *who* has the responsibility for paying a subcontractor when the public body or owner, as applicable, does not pay the general contractor and (ii) *when* must payment occur. She then walked the Workgroup through the status of the law prior to the enactment of SB 550, and how SB 550 changed such law. She explained that the biggest changes SB 550 made were to (a) prohibit "pay-if-paid" clauses in subcontracts between general contractors and subcontractors and hold general contractors liable for making payment to subcontractors regardless of whether the general contractor has received payment for the subcontractor's work from the public body/owner and (b) establish timelines for when (1) owners must make payment to general contractors on private contractors and (2) general contractors (and any other higher-tier contractor) must make payment to subcontractors on both public and private contracts.

Ms. Budd then turned to the list of potential technical amendments to SB 550. To assist with the Workgroup with following her presentation, she pointed it to a handout that she created listing the amendments in three categories – those that would affect the bill

generally across both sections contained in the bill, those that would affect § 2.2-4354 of the VPPA dealing with public contracts, and those that would affect § 11-4.6 dealing with private contracts. She noted that one of the big themes of the amendments is that many of them seek to make the language of SB 550 more uniform. She explained that an important legislative drafting principle is to use the same language when you intend to mean the same thing. She stressed that this is important because the Cannons of Statutory Construction hold that when a legislature uses different language (words, phrases, terms) in various places, it must have intended to mean something different in each place. Courts will interpret the statute using this principle. She explained to the Workgroup that as she goes through the amendments, they will see that there are several places in SB 550 where it appears that the legislature intended to say the same thing in multiple places in the bill, but it ended up using different language in each place. This inconsistency, she stressed, leads to difficulties with interpreting and implementing the provisions of the bill.

The first category of amendments Ms. Budd discussed were those that affect the bill generally across all sections. She explained that the first potential amendment would be to make the definitions of "construction/construction contract," "contractor/general contractor," and "subcontractor" uniform in their application to both public contacts (§ 2.2-4354) and private contracts (§ 11-4.6). She noted that one of the challenges with the way that SB 550 was written is that the bill inserts the new provisions of Code into existing Code sections, and these existing Code sections already had their own sets of definitions that apply to each of them separately – the VPPA and § 11-4.6. The problem is that each of those sets of definitions are different from one another. As such, the payment liability and timing provisions added to the Code by SB 550 end up applying to different pools of individuals depending upon whether the contract at issue is public (which is governed by § 2.2-4354 and the definitions in the VPPA) or private (which is governed by § 11-4.6 and the definitions in that section).

For example, Ms. Budd highlighted both the VPPA and § 11-4.6 define "contractor/general contractor" and "subcontractor," but § 11-4.6 explicitly excludes materials suppliers from its definitions of "general contractor" and "subcontractor." She noted that the corresponding definitions in the VPPA do not have this exclusion. She explained that as a result, materials suppliers on public contracts will be subject to SB 550's payment liability and timing provisions, but not materials suppliers on private contracts. She asked the Workgroup to consider whether the legislature intended these differences. She stated that the answer is most likely "no" – it appears that the legislature intended to impose similar payment liability and timing provisions for both public contracts and private contracts, and these differences in application seem to simply be a product of how the bill was drafted by inserting the new provisions of SB 550 into existing Code sections and thereby co-opting the existing (but different) definitions that already applied to those Code sections. As another example, she pointed out that the definitions of "construction" are different in the VPPA versus § 11-4.6. She again asked the Workgroup to consider whether this difference was intentional. She said it most likely was not, but either way these inconsistencies in the application of the bill's provisions depending upon whether the contract at issue is public or private is confusing and makes the bill challenging to implement. To alleviate these issues, she suggested that the

Workgroup could consider recommending to the General Assembly that uniform definitions of "construction/construction contract," "contractor/general contractor," and "subcontractor" be used for both the section pertaining to public contracts (§ 2.2-4354) and the section pertaining to private contracts (§ 11-4.6).

Ms. Budd explained that the second potential technical amendment to SB 550 also deals with the definitions in the VPPA and in § 11-4.6. She noted that the Workgroup has received testimony that it appears that it was the intent of the General Assembly to exclude contracts for professional services, including contracts for architectural or professional engineering services, from the scope of the bill, but the language of the bill does not make this exclusion explicit. As such, she noted that the Workgroup could consider recommending to the General Assembly that language be added to the definitions applicable to § 2.2-4354 in the VPPA and § 11-4.6 to clarify that such contracts are excluded from the scope of the bill.

Ms. Budd explained that third potential technical amendment hits directly on the theme she mentioned earlier regarding making the language of the bill more uniform where it appears that the legislature intended to convey the same concept. Ms. Budd noted that SB 550 includes language in three places that expresses the concept that an owner/general contractor shall not be liable for paying a general contractor/subcontractor, as applicable, when the general contractor/subcontractor has not complied with the terms of the contract.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

Lines 12-13: Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

Lines 57-58: An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

Lines 72-73: Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor.

In each of these three places, however, the language is worded differently. To make the bill easier to interpret, as well as bring consistency to its implementation, she stated that the Workgroup could consider recommending to the General Assembly that this language be amended to make it uniform in all three places in which it appears in the bill.

Regarding the fourth potential technical amendment, Ms. Budd noted that SB 550 similarly includes language in three places in the bill that established a requirement that that an owner/general contractor has to provide notice to its general contractor/subcontractor (as appropriate) if the owner/general contractor wishes to withhold payment from the general contractor/subcontractor.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

> **Lines 14-16**: However, in the event that the contractor withholds all or a part of the amount promised to the subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

> **Lines 59-62**: However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

> **Lines 74-78**: However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance.

Again, however, the language in each of these three places is worded differently. She suggested again that to make the bill easier to interpret and more consistent in its implementation the Workgroup could consider recommending to the General Assembly that this language be amended to make as uniform as possible and appropriate in all three places in which it appears in the bill.

Also on the subject of the notice requirement, Ms. Budd explained that the fifth potential technical amendment would be to establish a timeline for *when* the notice of withholding payment must be given. She emphasized that the notice provisions currently in the bill establish the ***requirement*** to provide notice if payment will be withheld, but they don't establish a ***timeline*** for when such notice must be provided. To address this issue, she

suggested that the Workgroup could consider recommending that the General Assembly establish such timelines. She noted that one option for establishing a timeline could be to link the timeline for providing the notice with the deadlines already established by SB 550 for when payment must be provided. For example, the language could be amended to state that a general contractor must (i) pay the subcontractor or **(ii) provide notice, in writing, of the general contractor's intention to withhold all or a portion of the subcontractor's payment** within the earlier of (a) 60 days after receiving an invoice from the subcontractor or (b) seven days after receiving payment from the owner.

Ms. Budd then moved on to discussing potential technical amendments to § 2.2-4354 in the VPPA, which deals with public contracts. The first such amendment would be to reconcile the provisions added by SB 550 in subdivision 1 with the existing provisions of the Prompt Payment Act that were moved to subsection 2. Ms. Budd noted that Mr. Manchester also touched on this topic.

Ms. Budd explained that the existing provisions of the Prompt Payment Act that were moved to subdivision 2 have been in place for many years, and they apply to *all* types of contracts – goods, services, construction, etc. They require a contractor to take one of two actions within seven days of receipt by the contractor of payment from a public body on a public project: (i) pay its subcontractor its proportionate share of the total payment received or (ii) notify the agency and the subcontractor in writing of its intention to withhold all or a part of the payment with the reason for nonpayment. The new provisions added by SB 550 in subdivision 1, however, apply *only* to construction contracts. As such, when discerning the provisions of law applicable to construction contracts, subdivisions 1 and 2 must be read together.

Ms. Budd noted that the first sentence in subdivision 1 on lines 11-12 of the bill requires the contractor to be liable for the "entire amount owed" to any subcontractor with which it contracts. This is different from the "proportionate share" language in subdivision 2, however. She highlighted that it is unclear how the "entire amount owed" language is intended to interact with the "proportionate share" language, and she noted that this is something that the Workgroup could consider recommending that the General Assembly clarify.

Additionally, she noted that as Mr. Manchester mentioned, SB 550 does not repeal the VPPA's retainage provisions, but the words "entire amount owed" in subdivision 1 create confusion on this point. She highlighted that subsection B (on lines 63-64) and subsection C (on lines 84-85) of § 11-4.6 include the following language in order to dispel any such confusion in that section: "Nothing in this subsection shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract." She suggested that to alleviate any confusion and make the bill more consistent throughout both sections, the Workgroup could consider recommending to the General Assembly that this language also be included in subdivision 1 of § 2.2-4345.

Ms. Budd further noted that while subdivision 2 (the existing provisions of the Prompt Payment Act) establish the obligation of the general contractor to either (i) pay the

subcontractor or (ii) provide notice to the subcontractor to it intends to withhold payment within seven days of the general contractor receiving payment from the public body, and subdivision 1 establishes the obligation of the general contractor to pay the subcontractor regardless of whether the general contractor has received payment from the public body, neither subdivision 1 nor subdivision 2 establish ***when*** the general contractor has to pay the subcontractor in instances in which the general contractor has not received payment from the public body. An argument could be made that the provisions of subsection C of § 11-4.6 (which requires a general contractor, when it has not been paid by the owner, to pay the subcontractor within "60 days from the date of satisfactory completion of the work for which the subcontractor has invoiced") provide the deadline for payment in such instances, but it is not entirely clear that the provisions of subsection C of § 11-4.6 are intended to apply to subcontracts on public contracts. As such, she suggested that the Workgroup could consider recommending that the General Assembly add clarifying language to § 2.2-4354 to establish a clear deadline for when payment is due from general contractors to subcontractors on public contracts in circumstances in which the general contractor has not received payment from the public body.

Ms. Budd explained that the final potential technical amendment to § 2.2-4354 pertains to the interest clause in subdivision 4. The current language in subdivision 4 requires general contractors to pay interest to their subcontractors on all amounts owed by the general contractor that remain unpaid after seven days following receipt by the general contractor of payment from the public body for work performed by the subcontractor under the contract. Similarly, subsection B (on lines 62-63) and subsection C (on lines 82-84) of § 11-4.6 require owners and general contractors to pay interest on past-due amounts.

She stated that if the Workgroup recommends adding language to § 2.2-4354 to clarify ***when*** payment is due to a subcontractor in instances in which the general contractor has not been paid by the public body, the Workgroup could consider also recommending that the interest clause in subdivision 4 be expanded to require general contractors to pay interest on amounts that are not paid by such deadline.

Ms. Budd then moved on to discuss potential technical amendments to § 11-4.6, which deals with private contracts. She noted that the first technical amendment would be to correct the catchline for § 11-4.6. She explained that SB 550 added the provisions to § 11-4.6 dealing with payment liability and timing, § 11-4.6 only dealt with issues surrounding the liability of a contractor for the wages of a subcontractor's employees. Ms. Budd noted that this is reflected in the catchline for § 11-4.6, which simply says: § 11-4.6. Liability of contractor for wages of subcontractor's employees. She explained that the catchline was not updated by SB 550 to reflect the new provisions it added to § 11-4.6 dealing with payment liability and timing. As such, she suggested that to add clarity to § 11-4.6 the Workgroup could consider recommending that the catchline be updated to reflect ***both*** the existing provisions of § 11-4.6 *and* the new provisions added by SB 550.

Regarding the second potential technical amendment to SB 550, Ms. Budd explained that the Workgroup could consider recommending that the General Assembly fix the

subsection and subdivision lettering in § 11-4.6 to separate out the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees from the new provisions added by SB 550 dealing with owners' and general contractors' payment liability and timing. She explained that when new provisions were added to § 11-4.6 by SB 550, they were each assigned their own subsection (B and C), and the existing subsections in § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees were simply re-lettered (from B, C, D, and E to D, E, F, and G) to accommodate the new provisions. She stressed that not only would it be helpful for interpreting and understanding § 11-4.6 to reconfigure it by assigning the provisions added by SB 550 dealing with payment liability and timing its *own* subsection and subdivisions within such subsection and the provisions dealing with the liability of a contractor for the wages of a subcontractor's employees *its* own subsection and subdivisions within such subsection, doing so would help to resolve an issue on line 106 where the language states, "The provisions of this ***section*** shall only apply if …" Such sentence is clearly intended to only apply to the provisions of the bill related to the liability of a contractor for the wages of a subcontractor's employees and *not* the new provisions of § 11-4.6 dealing with payment liability and timing, but the reference to the entire section creates confusion. To help the Workgroup visualize these potential changes, Ms. Budd pointed the Workgroup to a draft of these changes that was included in the meeting materials.

Ms. Budd noted that the third potential technical amendment would be very important for both clarifying and aligning the language of the bill more closely with what appears to have been the intent of the General Assembly regarding the scope of the bill. She explained that when looking at SB 550 as a whole, it appears that its provisions (the payment liability and timing provisions) were intended to apply only to *construction* contracts. She noted that line 11 in § 2.2-4354 in the VPPA dealing with public contracts refers specifically to "a contractor on a ***construction*** contract." Similarly, line 54 in subsection B of § 11-4.6 establishes requirements for ***construction*** contracts between an owner and a general contractor on private projects. Additionally, the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees pertain only to ***construction*** contracts. However, the language on line 65 in subsection C of § 11-4.6 that establishes the requirements for contractors between a general contractor and a subcontractor on private projects refers to "Any contract in which there is at least one general contractor and one subcontractor …". She explained that as such, subsection C, as written, would apply to any contract between a general contractor and a subcontractor – i.e., goods, services, etc. – not *just* construction contracts. She noted that based on the language used throughout the rest of SB 550 and in the existing provisions of § 11-4.6 that is limited only to construction contracts, the broad scope of subsection C of § 11.4-6 does not appear to have been intentional and instead appears to have simply been a mistake. To address this issue, she stated that the Workgroup could consider recommending that the General Assembly amend the language in subsection C of § 11-4.6 to clarify that its provisions *only* apply to construction contracts.

Moving on, Ms. Budd noted that the fourth potential technical amendment to § 11-4.6 would be to resolve the inconsistency in the timelines for payment that are set out in

subsection B for owners and in subsection C for contractors. She explained the on lines 55-57, subsection B of § 11-4.6 requires payment "within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced." However, on lines 69-70 subsection C of § 11-4.6 requires payment within "60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced …" She noted that not only are these provisions confusing and inconsistent, but they also establish different payment requirements for owners versus general contractors where there seems to be no logical reason for having such differences. To resolve this inconsistency, she suggested that the Workgroup could consider recommending that the General Assembly amend this language to make it uniform.

Finally, Ms. Budd explained that the final potential technical amendment to § 11-4.6 (and SB 550 in total) would be to resolve the inconsistent and confusing terminology used in subsection C of § 11-4.6. She noted that subsection C of § 11-4.6 uses all of the following terms: "general contractor;" "subcontractor;" "higher-tier contractor;" "lower-tier subcontractor;" "lower-tier contractor;" and "contractor." This mix of terminology is difficult to follow, and it is unclear if each of these terms is intended to refer to a distinct entity or if some of them are intended to overlap. She suggested that to clarify subsection C and allow for easier implementation of the bill's provisions, the Workgroup could consider recommending that the General Assembly amend subsection C of § 11-4.6 (i) to use only the terms "general contractor" and "subcontractor" (similar to § 2.2-4354 in the VPPA dealing with public contracts) and (ii) by inserting the following language from § 2.2-4354 from the VPPA that would make the provisions of subsection C apply throughout all of the tiers: Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

V. Consideration and Discussion of Public Comment, Written Comments, and Other Information Received by the Workgroup on SB 550

Ms. Gill then invited the Workgroup members to discuss how they would like to proceed with their task. Mr. Heslinga thanked both of the presenters for their presentations highlighting the legal issues surrounding SB 550. He noted that there are a lot of issues or potential issues, but, to him, some of the issues are of a different degree than others. He stated that some of the issues pertain to language that is just confusing, while some of the issues pertain to language that is inconsistent. He stressed that he does not know which inconsistencies were intended by the General Assembly and which were not. He also stated that it is not clear to him which of the issues rise to the level of potentially causing stakeholders problems and necessitating legislative correction action versus which of the issues are inevitably going to be worked out in court cases related to the statutes. He concluded by stating that he is not quite sure how the Workgroup is to address the points he made, but that he wanted to express that, notwithstanding the great presentations, he was left with a number of questions about the various issues raised.

Ms. Gill then asked Mr. Heslinga his opinion as to how the Workgroup should proceed with working through the issues that he raised. Mr. Heslinga responded by acknowledging that the Workgroup is charged with making recommendations on SB 550. He referred to comments by Mr. Manchester that some of the issues raised in public comment on SB 550 should be studied and addressed in a different group, such as the Boyd-Graves Conference. He stated that if this Workgroup is the appropriate venue, then perhaps there needs to be a meeting for all of the lawyers, including private lawyers who may have interests or viewpoints, to really sit down and work through the issues. He noted that that is something that could happen under the auspices of this Workgroup, but it could also happen during the legislative process. He concluded by stating that he is not sure that he has all of the answers, but that he does have questions about how the Workgroup is to proceed at this point.

Addressing Mr. Heslinga's comments about having some of the issues surrounding SB 550 studied by the Boyd-Graves Conference, Ms. Gill noted that Mr. Manchester raised that proposal during his remarks concerning changes that had been proposed by stakeholders to Virginia's mechanics lien statutes. Ms. Gill stated that she agrees with Mr. Manchester's comments that issues surrounding Virginia's mechanics lien statutes are beyond the scope of the Workgroup, but she stated that she is not sure that she would say that the recommendations for technical amendments to SB 550 that were raised by the Construction Section of the Office of the Attorney General or by the Workgroup's staff are outside of the purview of the Workgroup since the Workgroup was directed to look at SB 550 and determine if legislative corrective action is needed. She stressed that any recommendations that the Workgroup would make to the General Assembly would not be directives to the General Assembly telling them that they *have* to make the suggested changes, but would simply be recommendations for changes for their consideration.

Ms. Haley concurred with Ms. Gill's remarks concerning the scope of the Workgroup's charge. She indicated that she believes that providing limited technical amendments that clean up the current policy and legislation is within the scope of what the Workgroup has been asked to do, but she noted that the Workgroup could also include in its report additional comments and recommendations that have been made by stakeholders during public comment that go beyond those limited technical amendments. She stated that such information could simply be offered for the General Assembly's consideration as they may consider further policy or technical amendments to SB 550. Ms. Gill concurred with Ms. Haley's comments.

Mr. Wade indicated his agreement, as well. He reminded the Workgroup of how quickly the legislative process moves and stated that he sees the enactment clause in SB 550 that directs the Workgroup to study SB 550 as essentially establishing a forum to (i) hear from affected stakeholders regarding issues with the practical implementation of SB 550 and (ii) develop recommendations based on such stakeholder feedback to assist the legislature with ultimately achieving its legislative intent. He noted that the presentations today encapsulate that concept – based on information received from the stakeholders, here are some recommendations for addressing the points they raised and better

effectuating the legislature's original intent. He indicated that it is common for the General Assembly to pass legislation that makes a significant policy change and for it to need to come back the following year to make changes to make the new laws more workable for stakeholders. He shared that he does not think it is the role of the Workgroup based on its charge with regards to SB 550 to delve into issues of whether the General Assembly should have made the policy change in the first place.

The Workgroup indicated its agreement with Mr. Wade's remarks. Ms. Gill then asked the Workgroup if it would like to have staff go through each of the potential technical amendments so that the Workgroup could discuss and possibly vote on them one-by-one. The Workgroup indicated its agreement.

VI. Findings and Recommendations on SB 550

Ms. Budd then walked the Workgroup through each of the potential technical amendments that she previously presented, and the Workgroup debated and voted on each amendment.

Generally

1. **Make the definitions of "construction/construction contract," "contractor/general contractor," and "subcontractor" uniform in their application to both public contacts (§ 2.2-4354) and private contracts (§ 11-4.6).**

   The Workgroup voted 6-0-1[1] to in favor of recommending to the General Assembly that it consider making the definitions of "construction/construction contract," "contractor/general contractor," and "subcontractor" that are applicable to SB 550's payment liability and timing provisions pertaining to public contacts in § 2.2-4354 and to SB 550's payment liability and timing provisions pertaining to private contracts in § 11-4.6 uniform so that all of SB 550's provisions apply more consistently across all groups of stakeholders.

2. **Clarify that contracts for professional services, including architectural or professional engineering services, are not included in the scope of the bill.**

   After brief discussion and a suggestion from Mr. Heslinga and Mr. Wade to slightly alter the wording of the recommendation, the Workgroup voted 6-0-1[2] in favor of recommending that the General Assembly consider clarifying *whether* contracts for professional services, including architectural or professional engineering services, should be included within the scope of the bill.

[1] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.
[2] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

3. Make the "noncompliance/breach" language uniform.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

> **Lines 12-13**: Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

> **Lines 57-58**: An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

> **Lines 72-73**: Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor.

The Workgroup voted 6-0-1[3] in favor of recommending to the General Assembly that it consider making the language that appears in three places in the bill (on lines 12-13, 57-58, and 72-73) and that provides that the owner or general contractor, as appropriate, shall not be liable to the general contractor or subcontractor, as appropriate, if the general contractor or subcontractor has not complied with the terms of the contract more uniform in order to enhance the clarity and consistency of the bill.

4. Make the "notice" language uniform.

Public Contracts: General Contractor → Subcontractor [§ 2.2-4354(1)]

> **Lines 14-16**: However, in the event that the contractor withholds all or a part of the amount promised to the subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

Private Contracts: Owner → General Contractor [§ 11-4.6(B)]

> **Lines 59-62**: However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment.

[3] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

Private Contracts: General Contractor → Subcontractor [§ 11-4.6(C)]

> **Lines 74-78**: However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance.

Ms. Budd noted that this potential technical amendment is a little more nuanced than the previous one because it appears that it may have been possible that the General Assembly intended some of the variations in the language in each of these three sentences, but she indicated that there is still likely some unintentional differences in some of the language and that removing those unintentional differences would assist with making the bill clearer and more consistent. As such, she recommended that the recommendation be tweaked to say that the Workgroup recommends that the General Assembly consider making the language that appears in three places in the bill (on lines 14-16, 59-62, and 74-78) and that establishes the requirement that owner or general contractor, as appropriate, provide notice to the general contractor or subcontractor, as appropriate, that it intends to withhold funds more uniform where *appropriate and intended* in order to enhance the clarity and consistency of the bill. The Workgroup voted 6-0-1[4] in favor of such recommendation.

5. Establish a timeline for when notice of withholding payment must be given.

The Workgroup voted 6-0-1[5] in favor of recommending to the General Assembly that it consider establishing a timeline for when notice of withholding payment must be given.

Public Contracts - § 2.2-4354

1. Reconcile the provisions added by SB 550 in subdivision 1 with the existing provisions of the Prompt Payment Act that were moved to subsection 2.
- **a. Clarify the *type* of contracts to which each subdivision applies – subdivision 1 only applies to construction contracts, but subdivision 2 applies to all contracts (including construction contracts).**
- **b. "Entire amount owed" (subdivision 1) vs. "proportionate share" (subdivision 2).**
- **c. Clarify that "entire amount owed" does not affect retainage.**
- **d. Reconcile subdivisions 1 and 2 with § 11-4.6 (C)?**
  - **i. When must a general contractor pay a subcontractor when the general contractor has not been paid by the public body?**

In the context of considering the uniformity of the application of SB 550's amendments to § 2.2-4354, the Workgroup engaged in discussion as to whether all local public bodies

[4] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.
[5] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

and public institutions of higher education are subject to such provisions. The Workgroup determined that this is a complex issue and needs to be highlighted for the General Assembly for its consideration in its report.

The Workgroup voted 6-0-1[6] in favor of recommending to the General Assembly that it consider reconciling the provisions added by SB 550 in subdivision 1 with the existing provisions of the Prompt Payment Act that were moved to subsection 2 and, in doing so, consider clarifying (i) the type of contracts to which each subdivision applies, (ii) how the "entire amount owed" language in subdivision 1 is intended to interact with the "proportionate share" language in subdivision 2, (iii) that the "entire amount owed" language in subdivision 1 is not intended to affect the VPPA's retainage provisions, and (iv) when a general contractor must pay a subcontractor when the general contractor has not been paid by the public body.

2. Subdivision 4 (interest clause) – Amend to require general contractors to pay interest on amounts that are past-due in situations in which the general contractor has not been paid by the public body.

Ms. Budd further explained that the current language in subdivision 4 requires general contractors to pay interest to their subcontractors on all amounts owed by the general contractor that remain unpaid after seven days following receipt by the general contractor of payment from the public body for work performed by the subcontractor under the contract. Similarly, subsection B (on lines 62-63) and subsection C (on lines 82-84) of § 11-4.6 require owners and general contractors to pay interest on past-due amounts. To bring further consistency to the bill, she explained that the Workgroup could consider recommending that the interest clause in subdivision 4 be expanded to require general contractors, in instances in which the general contractor has not been paid by the public body, to pay interest on past-due amounts. She noted that such amendment would more closely align the provisions of § 2.2-4354 to the corresponding provisions of subsection C of § 11.4.6.

Mr. McHugh commented that he believes that it is not the Workgroup's place to make this recommendation. Ms. Innocenti concurred with Mr. McHugh's remarks and stated that it is outside of the scope of their relationship regarding privity of contract with the subcontractor. Ms. Haley suggested that the Workgroup note this issue as a distinction made by the bill between the provisions of § 2.2-4354 and § 11-4.6, but not recommend that the General Assembly consider taking any action to address the distinction. The Workgroup voted 6-0-1[7] in favor of Ms. Haley's suggestion.

[6] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.
[7] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

Private Contracts - § 11-4.6

1. **Fix catchline for § 11-4.6.**
    a. **Current catchline = § 11-4.6. Liability of contractor for wages of subcontractor's employees.**

    Mr. Heslinga inquired as to whether the Code Commission has the authority to update the catchline of § 11-4.6 to reflect the new provisions that were added to it by SB 550. Mr. Wade responded that the Code Commission does have such authority, but the catchline is more likely to get updated during the drafting process if a member of the General Assembly requests a bill that amends § 11-4.6.

    The Workgroup voted 6-0-1[8] in favor of recommending to the General Assembly that it consider updating the catchline of § 11-4.6 to reflect ***both*** the existing provisions of § 11-4.6 (dealing with the liability of a contractor for the wages of a subcontractor's employees) *and* the new provisions added by SB 550 (dealing with payment liability and timing between private owners, general contractors, and subcontractors).

2. **Fix subsection/subdivision lettering to separate out the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees from the new provisions added by SB 550 dealing with owners' and general contractors' payment liability and timing.**

    The Workgroup voted 6-0-1[9] in favor of recommending that the General Assembly consider amending the subsection and subdivision lettering in § 11-4.6 to separate out the provisions of § 11-4.6 dealing with the liability of a contractor for the wages of a subcontractor's employees from the new provisions added by SB 550 dealing with owners' and general contractors' payment liability and timing, which would help to make § 11-4.6 easier to interpret and implement.

3. **Clarify that subsection C of § 11-4.6 applies only to "any *construction* contract," not "any contract."**

    The Workgroup voted 6-0-1[10] in favor of recommending that the General Assembly consider clarifying that subsection C of § 11-4.6 applies only to construction contracts.

4. **Resolve the inconsistency between the timelines for payment that are set out in subsection B for owners and in subsection C for contractors.**

    Lines 55-57 [§ 11-4.6(B)]: Requires payment "within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced."

[8] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.
[9] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.
[10] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

Lines 69-70 [§ 11-4.6(C)]: Requires payment within "60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced …"

Mr. McHugh noted his agreement with the recommendation and suggested that the Workgroup specifically recommend that the General Assembly consider using the language "receipt of invoice" in both places. Mr. Wade asked whether "receipt of invoice" is clearer and easier to interpret for practitioners than "satisfactory completion." Mr. McHugh answered in the affirmative and said that "receipt of invoice" aligns with the Prompt Payment Act in the VPPA, as well as standard requirements. He said that it is more of a standard practice than "satisfactory completion."

All members of the Workgroup agreed with Mr. McHugh's suggestion except for Mr. Heslinga. Mr. Heslinga stated that he is not sure that the legislature did not intend this inconsistency. Regarding the language on lines 55-57, he said that he could imagine that the legislature thought that an owner would need to receive an invoice from a general contractor in order to know when the owner needs to pay the general contractor. Regarding the language on lines 69-70, however, he said that general contractors should know when their subcontractors have completed their work, so there would be no need to require the subcontractor to send the general contractor an invoice. He concluded by stating that he supports flagging the inconsistency for the legislature so that it can determine whether it was intended, but not recommending that the legislature consider making the language uniform and using the "receipt of invoice" language in both places.

The Workgroup voted 5-1-1[11] in favor of recommending that the General Assembly consider (i) reconciling the inconsistency between the timelines for payment that are set out on lines 55-57 in subsection B for owners and on lines 69-70 in subsection C for contractors and (ii) reconciling such inconsistency by using the "receipt of invoice" language used on lines 55-57 in subsection B as the trigger for payment in both subsections.

5. **Resolve the inconsistent and confusing terminology used in § 11-4.6(C). § 11-4.6(C) uses all of the following terms: "general contractor;" "subcontractor;" "higher-tier contractor;" "lower-tier subcontractor;" "lower-tier contractor;" and "contractor." § 11-4.6(C) could be simplified by just referring to "general contractor" and "subcontractor" and inserting this language similar to this provision from § 2.2-4354 in the VPPA:**

   Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

   The Workgroup voted 6-0-1[12] in favor of recommending that the General Assembly consider amending subsection C of § 11-4.6 (i) to use only the terms "general contractor"

[11] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, and Ms. Gill. No: Mr. Heslinga. Abstain: Mr. Saunders.
[12] Yes: Ms. Pride, Ms. Innocenti, Mr. McHugh, Mr. James, Ms. Gill, and Mr. Heslinga. Abstain: Mr. Saunders.

and "subcontractor" (similar to § 2.2-4354 in the VPPA dealing with public contracts) and (ii) by inserting the following language from § 2.2-4354 from the VPPA that would make the provisions of subsection C apply throughout all of the tiers: Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

Ms. Budd then noted that this was her final suggested recommendation, but reminded the Workgroup that Mr. Manchester had suggested additional technical amendments in his remarks to the Workgroup earlier in the meeting. She asked if the Workgroup would like to take up those recommendations as well. Ms. Haley responded that if the Workgroup is open to it, her office could work on putting together some language for the Workgroup to consider. Ms. Gill responded in the affirmative.

Ms. Gill then asked the Workgroup if it would like to engage in any further discussion. Referring to comments concerning the potential effects of SB 550 on public procurement, such as increased costs, decreased competition, and impacts to bonding capacity made by Mr. Manchester in his presentation to the Workgroup, Ms. Pride asked if the Workgroup is open to flagging such issues as potential unintended consequences of SB 550 in its report to the General Assembly. Ms. Haley responded that some of the stakeholders made similar comments in their testimony before the Workgroup, and she feels that it is appropriate for the Workgroup to summarize the public comment received by the Workgroup in its final report. The Workgroup agreed.

VII. Public Comment

The Workgroup then heard public comment from stakeholders.

Fred Codding with the Iron Workers Employers Association (IWEA) and the Alliance for Construction Excellence (ACE) stated that he was disturbed by a comment made during one of the presentations stating that the General Assembly has traditionally left private parties to negotiate and agree upon their own contractual terms. He told the Workgroup that in recent years the General Assembly has taken some strong positions in a bipartisan way on waiver of mechanics lien claims and bond claims and made such provisions in private contracts unenforceable. He concluded by reiterating that while the General Assembly may not have traditionally been involved much in private contracts, it certainly has been in recent years.

Scott Kowalski, a construction lawyer in Lynchburg, Virginia with Petty, Livingston, Dawson & Richards, P.C. and a member of the Board of Directors of Associated Builders & Contractors (ABC) of Virginia, began his remarks by concurring with Mr. Codding's comments that over the last 10 to 15 years the General Assembly, at the behest of the construction industry, has placed itself in between private parties by stepping in to prohibit waivers of mechanics liens and waivers of bond rights, prohibit cost withholding across contracts, and prohibit certain indemnity provisions in construction contracts. He stressed that SB 550 is not the first foray into private contracting that the General

Assembly has taken. Mr. Kowalski further commented that ABC did not receive the proposed technical amendments until this morning, so they would like to reserve their ability to comment on the outcome of the discussion and recommendations made by the Workgroup today. He did note, however, that the most important amendment from ABC's perspective is the two timing of payment provisions. He stressed that if the owner is paying timely in accordance with the statute, the general contractor has the ability to also pay timely in accordance with the statute and not be placed into a predicament. He stressed that that is a big concern for ABC's members and, he thinks, for all of the contracting community.

There was no further public comment.

VIII. Discussion

There was no further discussion among the Workgroup members.

IX. Adjournment

Ms. Gill adjourned the meeting at 11:10 a.m. and noted that the next Workgroup meeting is scheduled for Monday, September 19, 2022 at 9:30 a.m. in conference rooms C, D, and E in the James Monroe Building in Richmond, Virginia.

For more information, see the Workgroup's website or contact that Workgroup's staff at pwg@dgs.virginia.gov.
